ECUADOR

TRADE SUMMARY

The U.S. goods trade deficit with Ecuador was $4.4 billion in 2006, an increase of $571 million from $3.8 billion in 2005. U.S. goods exports in 2006 were $2.7 billion, up 38.9 percent from the previous year. Corresponding U.S. imports from Ecuador were $7.1 billion, up 23.2 percent. Ecuador is currently the 44th largest export market for U.S. goods.

The stock of U.S. foreign direct investment (FDI) in Ecuador in 2005 was $760 million (latest data available), up from $720 million in 2004. U.S. FDI in Ecuador is concentrated largely in the mining sector.

Free Trade Negotiations

On November 18, 2003, the United States Trade Representative notified the Congress of the President's intent to initiate free trade agreement negotiations with Colombia, Peru and Ecuador, with Bolivia participating as an observer. Negotiations were launched on May 18, 2004, in Cartagena, Colombia. Negotiations with Ecuador took place through March 2006, but no date has been set for future negotiations.

IMPORT POLICIES

Tariffs

When Ecuador joined the World Trade Organization (WTO) in January 1996, it bound most of its tariff rates at 30 percent or less, except for agricultural products in the Andean Price Band System (APBS). Ecuador's average applied most favored nation tariff rate is 11.9 percent. Ecuador applies a four-tiered structure with levels of 5 percent for most raw materials and capital goods, 10 percent or 15 percent for intermediate goods, and 20 percent for most consumer goods. A small number of products including planting seeds, agricultural chemicals and veterinary products are duty-free.

As a member of the Andean Community (CAN), Ecuador grants and receives exemptions from tariffs (i.e., reduced *ad valorem* tariffs and no application of the Andean Price Band System) for products from the other CAN countries (Bolivia, Colombia and Peru). Currently, these countries have an Andean Free Trade Zone and are soon expected to apply Common External Tariffs (CET), as stated in CAN Decision 370. On January 31, 2006, the CAN trade ministers decided to postpone the entry into force of a new CET with a four-tiered structure (percent tariff levels of 0, 5, 10 and 20) for one year, until January 31, 2007. During this period, Peru applied its own tariff schedule while Ecuador and Colombia applied the structure permitted by Decision 370.

Ecuador maintains the APBS on 153 agricultural products (13 "marker" and 140 "linked" products) imported from outside the CAN. The 13 "marker" products are wheat, rice, sugar, barley, white and yellow corn, soybean, soybean meal, African palm oil, soy oil, chicken meat, pork meat and powdered milk. The APBS works as an internal price stabilization mechanism whereby the basic (*ad-valorem*) tariff is adjusted (increased or decreased) using a variable levy. The amount of the variable levy results from the relation between bi-weekly reference prices and floor and ceiling prices established by the CAN for each marker product. The price band works to maintain protection for domestic industry by keeping tariffs high when world prices fall, and drops tariffs when world prices rise.

As part of its WTO accession, Ecuador committed to phase out its price band system, starting in January 1996, with a total phase out by December 2001. No steps have been taken to comply with this commitment. Ecuador argues that retaining the APBS is WTO-consistent and does not constitute a violation of its agreements since Ecuador bound its final tariffs for agricultural commodities between 31.5 percent and 85.5 percent (the same bindings as the APBS).

Tariff-Rate Quotas

During the Uruguay Round, Ecuador agreed to establish tariff-rate quotas (TRQs) for a number of agricultural imports. In May of 2000, Ecuador created a TRQ Committee to administer and manage TRQs, which have remained constant and in line with WTO commitments since 2001. However, quota allocations are not always requested by importers because the tariffs under the APBS are sometimes lower than the in-quota TRQ tariffs. At the same time, the TRQ Committee is highly politicized and sometimes does not approve TRQ requests for certain products in order to protect local production (this is common with products such as poultry and powdered milk).

Products subject to TRQs include wheat, corn, sorghum, barely, barely malt, soybean meal, powdered milk, frozen turkeys and frozen chicken parts.

Non-Tariff Measures

Ecuador has failed to eliminate several non-tariff barriers since its WTO accession. Importers must register with the Central Bank through approved banking institutions to obtain import licenses for all products. Ecuador requires prior authorization from the Ministry of Agriculture (MAG) for the importation of most agricultural products. For certain sensitive products such as corn, soybean meal, dairy and poultry, the Minister himself or a designee must sign the authorization. The MAG argues that the authorization is to ensure sanitary standards and tax rules are followed. In reality, authorizations seem to be granted in a discretionary manner based on pressures for protection of domestic production. Another administrative hurdle agricultural importers must overcome is the MAG's use of "Consultative Committees." These committees, mainly composed of local producers, often advise the MAG against granting import permits to foreign suppliers. The MAG often requires that all local production be purchased at high prices before authorizing imports. If these barriers were removed, it is estimated that U.S. corn and soybean meal exports could increase by $10 million to $25 million each. The Ministry of Health is required to provide prior authorization for processed, canned and packaged products in the form of a Sanitary Registration. In general, the bureaucratic procedures that importers must follow in order to obtain authorizations continue to be cumbersome, protectionist and non-transparent.

Ecuador assesses a special consumption tax (ICE) of 32 percent on imported and domestic spirits. However, the taxable base upon which Ecuador assesses the ICE is arbitrary and complicated and differs for domestic and imported spirits. For imported spirits, the ICE is applied to the ex-customs value, which is then marked-up 25 percent (i.e., taxable base = [c.i.f. value + tariff + VAT] marked up by 25 percent); the ICE is assessed on this inflated value. In contrast, for domestic spirits, the ICE is assessed on the ex-factory price, and the 25 percent mark-up, although legally required, is not generally applied (i.e., taxable base = [ex-factory value + VAT]). In both cases, the excise tax is based on arbitrary values and not on actual transaction values.

Ecuador also continues to maintain a pre-shipment inspection regime for imports with a free on board value of more than $4,000. An authorized inspection company conducts pre-shipment inspection (both before shipment and after specific export documentation has been completed at the intended destination), and customs authorities perform random spot-checks. These practices generally add between six and eight weeks to shipping times.

Ecuador maintains bans on the import of used motor vehicles, tires and clothing.

In April 2006, Ecuador's Congress approved a controversial Food and Nutrition Security law. This bill invoked the precautionary principle and in practice prohibited the use, handling, trade or import of any food products that may have contained organisms derived from biotechnology, since Ecuador did not possess appropriate institutions to provide proof of their safety. The prohibition stopped large imports of several commodities in high demand by the animal feed and cooking oil industry (soybean meal and oil) for several weeks. However, due to pressure from local industry, Ecuador's Attorney General declared this law unenforceable due to technical errors in the text.

Health Code legislation passed by Congress in December 2006 reintroduces the provisions of the Food and Nutrition Security law. However, imports have continued normally and it appears the Ministry of Agriculture is awaiting the development of implementing legislation before enforcing the law. Affected private sector industries plan to work with Ecuadorian authorities to develop implementing regulations that would not impede trade in biotechnology products.

STANDARDS, TESTING, LABELING AND CERTIFICATION

Ecuador's Animal and Plant Health Inspection Service (SESA) is responsible for administering Ecuador's sanitary and phytosanitary controls. According to Ecuadorian importers, bureaucratic procedures required to obtain clearance still appear to discriminate against foreign products. Ecuador is bound by the WTO Agreement on the Application of Sanitary and Phytosanitary (SPS) measures, yet denials of SPS certification often appear to lack a scientific basis and to have been used in a discriminatory fashion to block the import of U.S. products that compete with Ecuadorian production. This occurs most often with poultry, turkey and pork meats, beef, dairy products, and fresh fruit. The ability to import some products, such as rice, corn, soybeans and soybean meal, depends entirely on the discretion of the MAG which will often look to the Consultative Committees for advice. Ecuador has yet to fulfill its notification obligations under the WTO SPS Agreement. The impact of removing this barrier would mean an increase of U.S. exports of up to $10 million.

SESA follows the CAN's "Andean Sanitary Standards." Some standards applicable for third countries are different from those applied to CAN members. For example, there can be differences in the requirements for CAN and third countries for the importation of live animals, animal products, and plants and plant by-products. SESA also requires certifications for each product stating that the product is safe for human consumption or, in the case of live animals, that the animal is healthy and that the country of origin or the area of production is free from certain exotic plant or animal disease. Industry sources assert that this process has been used unreasonably by SESA to prevent entry of animal products - especially poultry - that compete with local producers.

Sanitary registrations are required for imported as well as domestic processed food, cosmetics, pesticides, pharmaceuticals and syringes as well as some other consumer goods. However, in a side agreement to its WTO Accession Agreement, Ecuador committed to accept the U.S. Certificate of Free Sale authorized by the U.S. Food and Drug Administration, instead of the Government of Ecuador's Sanitary Registration. In August 2000, the government of Ecuador passed a law (*Ley de Promocion Social y Participacion Ciudadana*, Segunda Parte – also known as Troley II), followed by regulations issued in June 2001, to reform the issuance of sanitary permits for food products. This is a step towards modernizing the issuance of sanitary registrations with new regulations that allow the acceptance of free sale certificates, require that the government issue sanitary permits within 30 days of receipt of a request, and reduce the number of documents required to obtain a permit. However, it does not appear that these regulations are being applied consistently and U.S. export losses are estimated to be around $5 million.

U.S. firms report that the Izquieta Perez National Hygiene Institute (INHIP - the Ministry of Health's executive arm responsible for granting the sanitary registration certificate) office in Guayaquil accepts the U.S. Certificates of Free Sale, but continues to apply the old regime for sanitary permits. In addition, non-transparent bureaucratic procedures and inefficiency have delayed issuance beyond 30 days and in some cases have reportedly blocked the entry of some products imported from the United States.

U.S. companies have expressed concerns regarding regulations issued by Ecuador's public health ministry requiring foreign food manufacturers to disclose confidential information such as formulas of imported food and pharmaceutical products. This requirement appears to go beyond the requirements of the Codex Alimentarius Commission on International Standards and Labeling. Pharmaceutical and agrichemical industry sources estimate that lost U.S. exports due to this problem amount to $10 million to $25 million.

The U.S. Foreign Agricultural Service has been facilitating SPS training for Ecuadorian officials by providing SPS experts for seminars and other training forums.

GOVERNMENT PROCUREMENT

Government procurement is regulated by a 2001 public contracting law. Foreign bidders must be registered in Ecuador and have a local legal representative in order to participate in government procurement. The law does not discriminate against U.S. or foreign suppliers. However, bidding for government contracts can be cumbersome and relatively non-transparent. This lack of transparency can lead to cancellations of bid solicitations that unnecessarily add to the costs of participating in government procurement and to subjecting the procurement process to possible manipulation by contracting authorities. A large number of government-controlled companies (e.g., fixed-line telephony providers, electric power generators and distributors, hospitals, and clinics) are not subject to Ecuador's rules on government procurement. Ecuador is not a signatory to the WTO Agreement on Government Procurement.

INTELLECTUAL PROPERTY RIGHTS (IPR) PROTECTION

The basic legal tenets of Ecuador's IPR regime are provided for under a comprehensive 1998 IPR law and Andean Pact Decisions 345, 351 and 486. The 1998 intellectual property law provides greater protection for intellectual property than existed before it came into effect; however, Ecuador's IPR regime is deficient in a number of areas and the law is not being adequately enforced.

Copyrights

The government of Ecuador, through the National Copyright Office's Strategic Plan Against Piracy, has committed to take action to reduce the levels of copyright piracy, including implementation and enforcement of its 1998 Copyright Law. However, copyright enforcement remains a significant problem, especially concerning sound recordings, computer software and motion pictures. The government of Ecuador has not taken action to clarify Article 78 of the 1999 Law on Higher Education, which could be interpreted to permit software copyright violations by educational institutions.

Patents and Trademarks

Ecuador's 1998 IPR law provided an improved legal basis for protecting patents, trademarks and trade secrets. However, concerns remain regarding several provisions, including a working requirement for patents, and inadequate protection of proprietary pharmaceutical test data submitted for marketing approval. U.S. companies are also concerned that the Ecuadorian government does not provide patent protection to new uses of previously known or patented products.

Government of Ecuador health authorities continue to approve the commercialization of new drugs that are the bioequivalent of patented drugs, thereby denying the originator companies effective patent protection for innovative drugs. However, a court decision in 2006 that characterized efforts by a patent holder to remove illegal copies from the market as an illegal competitive practice was overturned on appeal in 2007.

Proprietary pharmaceutical test data submitted for marketing approval is also not being afforded adequate protection. In effect, the government of Ecuador is allowing the test data of registered drugs from originator companies to be relied upon by others seeking approval for their own version of the same product. According to the pharmaceutical industry, confidential chemical formulae and descriptions of manufacturing processes have also found their way into the hands of competitor companies. A recent modification to Ecuador's health code in late 2006 permits sanitary registrations without regard to whether or not a medication is patented.

Enforcement

There continues to be an active local trade in pirated audio and video recordings, computer software and counterfeit brand name apparel. The International Intellectual Property Alliance estimates that piracy levels in Ecuador for recorded music have reached 90 percent, with total estimated damage due to piracy of $26.3 million in 2005. At times, judges in IPR cases, before issuing a preliminary injunction, demand a guaranty and evidentiary requirements that may exceed legal requirements and in effect limit the ability of rights holders to enforce their rights. Ecuador has made no progress in establishing the specialized IPR courts required by Ecuador’s 1998 IPR law. The national police and the customs service are responsible for carrying out IPR enforcement, but do not always enforce court orders. Some local pharmaceutical companies produce or import counterfeit drugs and have sought to block compliance with Ecuador’s Intellectual Property law and improvements in patent protection. U.S. industry estimates damage due to the failure to provide data exclusivity is at least $5 million.

SERVICES BARRIERS

Financial Services

Ecuador has ratified the WTO Agreement on Financial Services. The 1993 Equity Markets Law and the 1994 General Financial Institutions Law significantly opened markets in financial services and provided for national treatment of foreign suppliers. The Superintendent of Banks must certify accountants.

Telecommunications

In the area of basic telecommunications, Ecuador has only undertaken WTO commitments for domestic cellular services. Accordingly, it does not have market access or national treatment obligations for other domestic and international telecommunications services, such as fixed-line voice telephony and data transmission services. In addition, Ecuador has not committed to adhere to the pro-competitive regulatory commitments of the WTO Reference Paper. Several U.S. telecommunications companies have complained that they have had their international circuits disconnected without proper notice of alleged infractions.

INVESTMENT BARRIERS

Ecuador's foreign investment policy is governed largely by the national implementing legislation for Andean Pact Decisions 291 and 292 of 1991. Under Ecuadorian law, foreign investors are accorded the same rights of establishment as Ecuadorian private investors, may own up to 100 percent of enterprises in most sectors without prior government approval, and face the same tax regime. There are no controls or limits on transfers of profits or capital. In disputes, U.S. companies have resorted to local courts or alternate dispute resolution mechanisms such as the Chambers of Commerce; others have pursued international commercial dispute resolution mechanisms as provided for in their contracts or under the U.S.-Ecuador Bilateral Investment Treaty (BIT).

The transparency and stability of the country's investment regime are significantly weakened by the existence of numerous investment-related laws that overlap or that appear to have mutually inconsistent provisions. This judicial complexity increases the risks and costs of doing business in Ecuador.

The BIT, which entered into force in May 1997, includes obligations relating to national and most-favored-nation treatment; prompt, adequate and effective compensation for expropriation; the freedom to make investment-related transfers; and access to binding international arbitration of investment disputes.

In early 2005, Ecuador's Congress modified the Arbitration and Mediation Law to prohibit international arbitration of investment disputes if the national interest could be affected. Depending on how it is interpreted and applied, this modification of Ecuador's law may conflict with Ecuador's standing consent to binding arbitration under the BIT. At a minimum, the new law could create confusion among investors regarding their arbitration rights and may also reinforce negative impressions among investors of Ecuador's commitment to international arbitration.

Certain sectors of Ecuador's economy are reserved to the state. All foreign investment in petroleum exploration and development must be carried out under contract with the state oil company. U.S. and other foreign oil companies produce oil in Ecuador under such contracts. Foreign investment in domestic fishing operations, with exceptions, is limited to 49 percent of equity. Foreign companies cannot own more than 25 percent equity in broadcast stations, and foreigners are prohibited from owning land on the borders or the coast.

Several oil companies are involved in a dispute with the government of Ecuador relating to the refund of value-added taxes. In 2004, one of the disputing U.S. companies won a $75 million international arbitration award against the government of Ecuador. The government has requested a judicial review of the arbitration award. After notice of the award, Ecuador's solicitor general (Procurador General) initiated an investigation of the company for allegedly transferring assets to another foreign company without obtaining the required government authorization. The government of Ecuador has since nullified the company's contract and seized the company's considerable assets in Ecuador. The U.S. company has initiated arbitration proceedings under the BIT.

In 2006, Ecuador amended its hydrocarbons law, unilaterally increasing the share of revenues owed to the government under existing oil production sharing contracts. As a result, at least one U.S. company faces bankruptcy and is attempting to negotiate a change to its concession contract that would permit it to continue operating and investing in Ecuador (it has also initiated arbitration proceedings as allowed by its contract).

U.S. investors in the electricity sector face problems of chronic underpayment, due in part to government-regulated prices and the inability to cut off consumers that do not pay their bills; government subsidies only partially offset these losses and are not available to all firms. A 2006 electricity reform law attempts to address some of the problems plaguing the sector, but the problem of underpayment has not been resolved. U.S. firms in this sector are also pursuing international arbitration, and are simultaneously attempting to negotiate settlements with the government of Ecuador.

Effective compensation for expropriation is provided for in Ecuadorian law, but is often difficult to obtain. The extent to which foreign and domestic investors receive prompt, adequate and effective compensation for expropriations varies widely. It can be difficult to enforce property and concession rights, particularly in the real property, agriculture, oil and mining sectors. Foreign oil, energy and telecommunications companies, among others, have often had difficulties resolving contract issues with state or local partners.